

No. 11890

In the United States Circuit Court of
Appeals for the Ninth Circuit

NATIONAL AMERICAN FIRE INSURANCE COMPANY OF OMAHA,
A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES

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Assistant Attorney General.

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MEMORANDUM FOR THE UNITED STATES

This action was dismissed by the district court on the ground that the claim of an insurer as subrogee to the rights of its assured was not one on which relief could be granted under the Federal Tort Claims Act, 28 U. S. C. secs. 921-946. That view has since been rejected by this Court in *Employers Fire Insurance Co. v. United States*, 167 F. 2d 655 (April 8, 1948). It was there held that an insurer was entitled to intervene as subrogee in a suit brought by its assured against the United States, with the result that the insurer and assured were before the court in a single suit. It is the position of the United States that under the Federal Tort Claims Act, such joinder is necessary or the suit must be brought in the name of the assured. The United States has not consented to the splitting of a cause of action against it under that act; yet if an insurance company were allowed to sue alone as subrogee, a judgment in its favor could not prevent the assured or other insurers from recovering further damages in other suits on the same cause of

action. Such suits might even be brought in several districts, under the provision for venue at the residence of the plaintiff. 28 U. S. C. sec. 931. In addition, to permit separate suits by the insurer and the insurer would present problems as to the Government's rights to assert set-offs and counterclaims it might have.

Since the present complaint was dismissed in the court below for failure to state a cause of action, the question of joinder was not there dealt with. It is consequently deemed inappropriate to present at this time an extensive argument in support of the Government's position, but it is called to the attention of the Court in the belief that the Court should be advised of it in making disposition of this appeal.

Respectfully submitted,

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AUGUST 1948